No. 92-1213

# In the Supreme Court of the United States

OCTOBER TERM, 1992

VIRGINIA MILITARY INSTITUTE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
*Acting Solicitor General*

JAMES P. TURNER
*Acting Assistant Attorney General*

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the male-only admissions policy of the Virginia Military Institute violates the Equal Protection Clause under the test set forth in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 976 F.2d 890. The opinion of the district court (Pet. App. 23a-101a) is reported at 766 F. Supp. 1407.

### JURISDICTION

The judgment of the court of appeals was entered on October 5, 1992. A petition for rehearing was denied on November 17, 1992. Pet. App. 102a-104a. The petition for a writ of certiorari was filed on January 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Virginia Military Institute (VMI), located in Lexington, Virginia, is one of 15 public four-year colleges in Virginia. At one time, most of Virginia's public colleges were single-sex, but now all of them except VMI are coeducational. Since its founding in 1839 as the nation's first state military college, VMI has admitted only men to its four-year undergraduate degree program. Pet. App. 4a, 5a-6a, 8a. The male-only admissions policy is not dictated by state law. Rather, the policy has been perpetuated by VMI's 17-member Board of Visitors, to which state law has delegated authority for setting admissions policy. Va. Code Ann. § 23-104 (1985). Despite its male-only admissions policy, VMI received letters inquiring about admission and other indications of interest from 347 women between the fall of 1988 and the summer of 1990. Pet. App. 5a-6a, 8a, 68a, 87a. Under current practice, however, VMI does not respond to written inquiries from women. *Id.* at 87a.

VMI's stated mission is to produce "citizen-soldiers," which it describes as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 6a. VMI seeks to fulfill this mission through a program based on the "adversative" model of education. That program, which is not offered elsewhere in Virginia, emphasizes physical rigor, mental stress, equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values. *Id.* at 6a-7a, 17a-18a. Pursuant to the program, VMI—alone among Virginia's public colleges—requires all students to wear military uniforms, participate in military drills and parades, complete



courses in either military science, naval science, or aerospace studies, and live together in one large barracks. *Id.* at 7a-8a, 61a-62a.

2. The United States filed this action pursuant to 42 U.S.C. 2000c-6 in the United States District Court for the Western District of Virginia in March 1990. The complaint named as defendants, *inter alia*, the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent, and its Board of Visitors. The complaint alleged that VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. The complaint sought an order enjoining the defendants from discriminating on the basis of sex in the operation of VMI, including its admissions policy. Pet. App. 8a-9a.

The Commonwealth's Attorney General filed an answer on behalf of the Commonwealth, VMI, its Board of Visitors, and its Superintendent. The answer admitted that the Board of Visitors has a policy of admitting only males to the undergraduate program. C.A. App. 29. The Governor filed a separate answer, stating that "the failure to admit females to the Institution is against his personal philosophy," and that "no person should be denied admittance to a State supported school because of his or her gender." *Id.* at 41.[1] The Governor also stated he would "abide by the decision of the Court to the full extent of his authority." *Id.* at 42.

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[1] The Attorney General was granted an "order of exemption" relieving her of the duty to represent the Governor in this litigation; the order was based on the Governor's finding that the Attorney General could not represent both the Governor's interests and those of the other defendants, "those interests not being the same." C.A. App. 129.

As a result of the Governor's answer, the Attorney General withdrew as counsel for the Commonwealth, VMI, its Superintendent, and its Board of Visitors, asserting that the Commonwealth's position conflicted with the position of the remaining defendants. Pet. App. 9a. As the Attorney General explained in a letter to the Governor, the Governor's answer provided "persuasive" evidence of the Commonwealth's policy regarding single-sex education, in the absence of a statute expressing its policy; however, the Governor's position—*i.e.*, "that VMI's admission policy serves no legitimate public policy objective," C.A. App. 131—conflicted with the only viable legal defense available to VMI—*i.e.*, "that VMI's status as a single-gender institution serves the important policy objective of the Commonwealth in promoting educational diversity," *ibid.* Upon withdrawing, the Attorney General appointed private counsel to represent the Commonwealth. *Id.* at 134.

Before trial, the Commonwealth was granted a "stay" relieving it of the duty to appear at trial on the condition that it agree to be bound by any ruling of the court. In addition, the Governor was relieved of the duty to testify at trial. Thus, the only state entity that offered a justification for VMI's male-only admissions policy was VMI's Board of Visitors. Pet. App. 9a.[2]

3. On June 14, 1991, the district court entered judgment in favor of the defendants. Pet. App. 23a-101a. Although the court found that "[w]omen are denied a unique educational opportunity that is available only at VMI," *id.* at 78a, it concluded that VMI's male-only admissions policy met the test for permissible gender classifications set forth in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982), Pet. App. 40a. Under that test, "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of * * * showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724 (quoting *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

The court first considered the purported state objective served by VMI's admissions policy. The court determined that "diversity in education" is a "legitimate objective" for a State to pursue. Pet. App. 32a. It further determined, in light of evidence that "[b]oth men and women can benefit from a single-sex education," that single-sex education is a legitimate form of diversity. *Id.* at 38a. In the court's view, the evidence of the benefits of single-sex education "fully justified" VMI's exclusion of women, "even without taking into consideration the other unique features of VMI's method of teaching and training." *Id.* at 34a. The court was also impressed by the "unique" nature of VMI's program. *Id.* at 37a. The court concluded that "both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system." *Ibid.*

The court next determined that VMI's male-only admissions policy was "substantially related" to the achievement of educational diversity because

[2] Petitioners are defendants VMI, its Board of Visitors, and its Superintendent, together with intervenor-defendants VMI Foundation, Inc., and the VMI Alumni Association.

"[VMI's] single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." Pet. App. 37a. Specifically, the court believed that VMI would have to adopt less stringent physical education requirements for women, even though the court credited "[e]xpert testimony establish[ing] that * * * some women are capable of all of the individual activities required of VMI cadets." *Id.* at 34a. In addition, the court found that female students would distract male students from their studies and create other new stresses. The court further found that VMI would have to alter its facilities to allow men and women privacy from the other gender during activities such as undressing and showering. *Id.* at 34a-36a. The court concluded that those changes "provide sufficient constitutional justification for continuing the single-sex policy." *Id.* at 36a.

4. The court of appeals vacated and remanded. Pet. App. 1a-22a. It agreed with the district court's conclusion "that single-sex education is pedagogically justifiable" because it can benefit both men and women. *Id.* at 17a. The court of appeals also found adequate support for the district court's finding that VMI would change significantly if women were admitted. *Id.* at 14a. But those changes, the court of appeals determined, would stem not from the presence of women, but from the shift to coeducation:

> It is not the maleness, as distinguished from femaleness, that provides justification for [VMI's] program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI.



*Id.* at 15a. The court of appeals explained that "[t]he problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally to rise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI." *Id.* at 16a-17a. Given its conclusion that the integrity of VMI's program depended on single-genderedness (as opposed to maleness) and "[t]he parties[']agree[ment]" that the program "makes a positive contribution offered by no other institution," *id.* at 17a, the court framed the "decisive question" under *Hogan* as "why [Virginia] offers the unique benefit of VMI's type of education and training to men and not to women," *id.* at 18a.

The court concluded that the Commonwealth "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." Pet. App. 21a. The court observed that the record contained no "stated policy justifying single-sex education in state-supported colleges and universities." *Id.* at 19a. The court determined that, in any event, "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking." *Ibid.* The court reasoned that "[a] policy of diversity which aims to provide a[n] array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Id.* at 19a-20a. The court concluded that the Commonwealth's policy of offering a VMI-type education to men but not to women was not shown to achieve any objective be-

yond favoring men with an educational choice not available to women. *Id.* at 20a-21a.

Although it found a violation of the Equal Protection Clause, the court of appeals declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." Pet. App. 21a. The court instead "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *Ibid.* The court of appeals emphasized, in particular, that "[b]y commenting on the potential benefits of single-gender education * * *, [it] d[id] not mean to suggest the specific remedial course that the Commonwealth should or must follow hereafter." *Ibid.* Thus, the court stated that, consistently with its opinion, "the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution." *Ibid.* The court added that "there might be other more creative options or combinations." *Ibid.*

## ARGUMENT

Contrary to petitioners' assertion (Pet. 9), this case does not present the question whether it is constitutional for public schools to adopt single-sex admissions policies. That question is not presented because the court of appeals did not base its decision on VMI's failure to justify its male-only admissions policy. Instead, the court based its decision on the failure of the Commonwealth of Virginia "to articu-



late an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." Pet. App. 20a-21a. That was a proper basis for the court's holding that the Commonwealth was violating the Equal Protection Clause. That holding, moreover, reflects a straightforward, fact-bound application of the test for gender classifications set out in *Hogan*, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As the parties and the courts below recognized, this Court's decision in *Hogan* supplies the test for determining whether VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. Under the *Hogan* test, the Commonwealth had the burden of showing that VMI's exclusion of women (1) serves important governmental objectives and (2) is substantially related to the achievement of those objectives. See *Hogan*, 458 U.S. at 724. The court of appeals correctly concluded that the Commonwealth failed to make either showing.

a. Under the first part of the *Hogan* test, the State must articulate an important governmental objective and "establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Hogan*, 458 U.S. at 730. Thus, it was proper for the court of appeals not to accept uncritically VMI's allegation that the purpose of its male-only admissions policy was to promote a state policy of diversity. Looking beyond that allegation, the court correctly discerned a "lack of a state-announced policy to justify gender classifications." Pet. App. 19a.

As the court observed, the Comonwealth has not expressed a policy favoring gender diversity. The only official statement in the record on this subject, which was set out in the report of the Commission on the University of the 21st Century, did not support single-sex education; rather, it emphasized the importance of non-discrimination. Pet. App. 19a (quoting report statement that "it is extremely important that [colleges and universities] deal with faculty, staff, and students without regard to sex, race, or ethnic origin"). Moreover, the Attorney General of the Commonwealth determined that the Commonwealth did not have a policy favoring single-sex education. The absence of such a policy was what led the Attorney General to conclude that the Governor's opposition to VMI's male-only admissions policy represented state policy.

In concluding that there was no state policy favoring gender diversity, the court of appeals did not rely solely on the Commonwealth's failure to articulate such a policy. The court also took into account "the movement away from gender diversity in Virginia by public colleges and universities." Pet. App. 20a. As the court correctly reasoned, it is difficult to believe that VMI's male-only admissions policy has been retained as a result of a state policy favoring gender diversity when, over the same period, the other public colleges and universities in Virginia have moved to coeducation. *Ibid.* It is more likely, the court of appeals determined, that the retention of VMI's admissions policy stems from "delegation or inaction." *Id.* at 21a. Thus, the Commonwealth failed to satisfy *Hogan* by showing that its practice of offering a VMI-type education only to men was the product of "reasoned analysis" rather than the perpetuation of "traditional, often inaccurate, assumptions about the proper roles of men and women." 458 U.S. at 726. As the court of appeals observed, "the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women." Pet. App. 18a.



b. The court of appeals was also correct in holding that even if the Commonwealth had a policy of gender diversity, VMI's exclusion of women was not substantially related to the achievement of that policy. As the court of appeals recognized, the Commonwealth could not establish the requisite "substantial relationship" merely by showing that male students would be deprived of the benefit of a VMI-type education if women were admitted because their admission would change the nature of the program. As the court stated, "[a] policy of diversity which aims to provide a[n] array of educational opportunities, including single-gender institutions, must do more than favor one gender." Pet. App. 19a-20a.

That conclusion follows directly from *Hogan*. There, this Court rejected the dissent's argument that the female-only admissions policy of the Mississippi University for Women's School of Nursing was justified by the State's interest in giving women the choice of attending an all-female school:

> Since any gender-based classification provides one class a benefit or choice not available to the other class, * * * that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

458 U.S. at 731 n.17. The Court framed the relevant issue in a similar way in *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980), where the Court struck down a Missouri workers' compensation provision that required widowers, but not widows, to prove dependence on a deceased spouse in order to receive benefits:

> Providing for needy spouses is surely an important governmental objective, and the Missouri statute effects that goal by paying benefits to all surviving female spouses and to all surviving male spouses who prove their dependency. But the question remains whether the discriminatory means employed—discrimination against women wage earners and surviving male spouses—itself substantially serves the statutory end. Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration?

446 U.S. at 151 (citation omitted).

So too here, it is possible that the Commonwealth's support of a VMI-type program enhances the array of educational choices for men. But, as the court of appeals apprehended, the question remains "why the Commonwealth of Virginia offers the opportunity [for a VMI-type education] only to men." Pet. App. 18a. The Commonwealth did not supply a satisfactory answer to that question.

c. Petitioners contend that in requiring the Commonwealth to justify offering a VMI-type education only to men, the court of appeals imposed an "additional constitutional requirement" beyond those set forth in *Hogan*. Pet. 15. In petitioners' view, the *Hogan* test is satisfied "where a school's single-sex educational program confers benefits beyond those available in a coeducational setting." Pet. 12. Petitioners are mistaken.



As explained above, *Hogan* itself rejects the notion that a State may overcome an equal protection challenge merely by showing that the challenged classification confers a benefit on the favored gender; the State must also justify favoring that gender alone. To the same effect is *Wengler*, where the Court made clear that the classification itself must substantially further a legitimate state goal. Under *Hogan* and *Wengler*, it was not sufficient for VMI to show that its male-only admissions policy bore a substantial relationship to its institutional mission of producing "citizen-soldiers," as the court of appeals recognized, Pet. App. 17a. The Commonwealth was required to show that offering a VMI-type education only to men, but not to women, was substantially related to promoting diversity in Virginia's educational system.[3]

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[3] Petitioners attempt (Pet. 15) to glean significance from the fact that this Court in *Hogan* affirmed the Fifth Circuit's decision but did not expressly adopt its reasoning. That effort is misguided. The Fifth Circuit in *Hogan* rejected the State's argument that its nursing school's female-only admissions policy furthered a legitimate interest by increasing the range of educational opportunities for women. *Hogan* v. *Mississippi Univ. for Women*, 646 F.2d 1116, 1118-1119 (1981), aff'd, 458 U.S. 718 (1982). The Fifth Circuit stated that "[t]he problem with providing a unique educational opportunity for females but not for males is that such an approach does not bear a substantial relationship to th[e]

d. Petitioners also argue that the Commonwealth was justified in offering a VMI-type education only to men because "women would be unlikely to benefit from the adversative model of education offered at VMI," and there is "little or no demand" among women for a VMI-type program. Pet. 12-13. That argument is without merit.

First, neither the record nor the decisions below support petitioners' sweeping assertions regarding women's need and desire for a VMI-type education. In fact, the district court credited expert testimony stating that some women would benefit from a VMI-type education. Pet. App. 82a. It also found that "some women, at least, would want to attend [VMI] if they had the opportunity" (*id.* at 38a), and that "some women are capable of all of the individual activities required of VMI cadets" (*id.* at 34a). Moreover, the court of appeals determined that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." *Id.* at 21a.[4] Thus, petitioners are wrong in

important objective [of providing an education for all state citizens]." 646 F.2d at 1119. The substance of that statement was accepted by this Court. See *Hogan*, 458 U.S. at 731 n.17, quoted at page 11, *supra*. This Court understandably focused, however, on Mississippi's "primary justification" for the discriminatory admissions policy, which (in this Court) was that the policy remedied past discrimination. 458 U.S. at 727-731.

[4] See also Pet. App. 16a ("Both men *and* women appear to have benefited from single-sex education in a materially similar manner. The evidence about the VMI system suggests no differently."); *id.* at 18a ("Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single-sex female



suggesting that no women would benefit from, and that virtually no women would choose, a VMI-type education.

In any event, the gender-based generalizations upon which petitioners rely cannot justify the practice challenged here. To be sure, the evidence suggested that because of physiological differences, a greater proportion of men than women would be able to meet VMI's physical education requirements. See Pet. App. 78a-82a. That does not, however, justify the fact that *no* women, even those who can meet the physical education requirements, are offered the opportunity for a public education program of the kind offered at VMI. In similar circumstances, this Court has held that generalizations about a protected group cannot support discriminatory classifications. See *Wengler*, 446 U.S. at 151; see also, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 281-282 (1979); *Califano* v. *Goldfarb*, 430 U.S. 199, 204-207 (1977) (opinion of Brennan, J.); *id.* at 223-224 (Stevens, J., concurring in judgment); *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677, 686-687 (1973).

e. Petitioners also assert that the court of appeals "effectively held that a state cannot operate a single-sex school unless it operates at least *two* single-sex schools, one for men and one for women, offering the same type of educational program." Pet. 12; cf. Pet. 8 ("The appeals court held * * * that VMI's single-sex admissions policy violated the Fourteenth Amendment because the Commonwealth had not provided a

institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderedness.").

*similar* type of educational institution for women.") (emphasis added). At the same time, however, petitioners "do not doubt that states are required to provide generally comparable educational opportunities to men and women." Pet. 14. Petitioners apparently seek to draw a constitutional distinction between offering "generally comparable educational opportunities," which they concede is required, and offering "the same [or similar] type of educational program," which they argue is not.

Whether the Constitution draws such a distinction is not at issue in this case. Petitioners conceded below that there is no educational program comparable to VMI's; indeed, they consistently described VMI as "unique." See Pet. App. 17a & n.8; see also, *e.g.*, Pet. C.A. Br. 2, 21-24. In this Court, although they state (Pet. 14) that women can participate in the residential military college at Virginia Polytechnic Institute and State University (VPI), they do not contend that VPI is comparable to VMI, nor could they do so. The district court found that "[w]omen are denied a unique educational opportunity that is available only at VMI," Pet. App. 78a, and that the "military barracks at [VPI] are dramatically different institutions that offer dramatically different experiences" from those of VMI, *id.* at 54a. Petitioners' concession that States must provide generally comparable educational opportunities for men and women, and that there is no state program for women comparable to VMI's, supports the court of appeals' conclusion that the present state of affairs is unconstitutional.[5]

[5] The United States brought suit in this case challenging VMI's admissions policy and seeking the admission of women to VMI. See C.A. App. 23 (Compl. ¶ 15). The United States did not seek the creation of a separate institution or program for women, and the Commonwealth never suggested that it intended to create one. See Pet. App. 38a. Although the court of appeals commented on "the potential benefits of single-gender education," it carefully refrained from "suggest[ing] the specific remedial course that the Commonwealth should or must follow hereafter." *Id.* at 21a. Because the required remedy has yet to be resolved, this case does not present the question of the appropriateness of "separate but equal" schools for men and women. Although we do not believe that further review is warranted in this case, we reserve the argument that the court of appeals erred in suggesting that the Commonwealth has the option of creating an all-female, VMI-type institution.



2. Petitioners contend that the court of appeals' decision conflicts with decisions in other circuits addressing claims of sex discrimination in high school sports programs. Pet. 15-17. Those decisions, however, are inapposite.

Several of the decisions cited by petitioners hold that a school may, consistently with the Equal Protection Clause, have an all-girl sports team without having a corresponding all-boy team. For example, in the decision upon which petitioners principally rely (Pet. 16-17), *Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126 (1982), cert. denied, 464 U.S. 818 (1983), the Ninth Circuit rejected an Equal Protection Clause challenge by boys to their exclusion from their high school's only volleyball team, which was all-girl. Applying the *Hogan* test, the Ninth Circuit held that the claimed governmental interest in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes" was a "legitimate and important governmental interest." 695 F.2d at 1131. Turning to the second part of the *Hogan* test, the court deter-

mined from evidence of physiological differences between the sexes that boys would displace most of the girls if the boys were allowed to try out for the team. *Ibid.* Based on that determination, the court held that there was a "substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women." *Ibid.*

*Clark* and the other cases rejecting challenges by boys to all-girl teams (see Pet. 17 n.18) are readily distinguishable from this case. First, *Clark* and cases like it rest on the government objective of remedying past discrimination. None of the defendants here has suggested that VMI's male-only admissions policy was designed to remedy past discrimination. Second, this case involves college students, not high school students. Cf. *United States* v. *Fordice*, 112 S. Ct. 2727, 2736 (1992) ("[A] state university system is quite different in very relevant respects from primary and secondary schools."). Finally, although both this case and cases such as *Clark* involve evidence concerning physiological differences between males and females, it is far from clear that the evidence has the same significance in both the athletic and the academic settings.[6]

[6] In cases in which girls seek to participate on all-boy sports teams in the absence of a corresponding team for girls, the courts have uniformly held that girls cannot be wholly excluded from such teams, but instead must be allowed to compete for a position. See Pet. 16 n.17 (citing cases). In those cases, courts typically reason that paternalistic attitudes about females, safety concerns, and gender-based generalizations do not justify prohibiting individual females from trying out for a sports team on an equal basis with males. See, *Force by Force* v. *Pierce City R-VI School Dist.*, 570 F. Supp. 1020, 1028-1029 (W.D. Mo. 1983). As petitioners recognize



3. Petitioners assert that review by this Court is warranted because this case presents an issue "that arises frequently in the lower courts and is likely to continue to arise in a number of contexts." Pet. 18. That assertion does not withstand scrutiny.

The court of appeals' decision represents a straightforward application of the *Hogan* test to the facts of this case. Those facts primarily involve VMI, an institution that petitioners have consistently described as "unique." See page 16, *supra*. The court of appeals' opinion was narrowly written, resting heavily, for example, on the absence of evidence of a state-enunciated policy favoring single-sex education. Pet. App. 17a-20a. Thus, the decision below simply does not break any new ground.

Moreover, there are only three other single-sex public colleges in the nation. Pet. App. 52a; Pet. 18 n.19. Two of them have female-only admissions policies; a *Hogan* analysis of those policies would likely involve different factors from those involved here, such as whether the exclusion of males was justified as a remedy for past discrimination against women. For that reason, the legality of those schools' single-gender policies is not likely to be resolved by further review in the instant case. There is only one other all-male

(Pet. 16), decisions such as *Force by Force* do not conflict with the decision below. Nor does the remaining decision cited by petitioners, *Cape* v. *Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977), conflict with the decision below. *Cape* rejected a girl's equal protection challenge to an athletic association's use of different rules for boys and girls basketball games, holding that the association was not required to adopt the plaintiff's "personal notions as to how the game of basketball should be played." *Id.* at 795. *Cape* is inapposite for the same reasons as are the other cases involving high school sports teams.

public college besides VMI, and the fact that a challenge to its single-gender policy might raise issues similar to those of this case does not, standing alone, warrant further review.[7]

For reasons discussed above, the court of appeals' decision has no special relevance for cases involving primary and secondary education. See page 18, *supra*. In particular, the decision is not dispositive of the validity of primary or secondary education systems that offer comparable single-sex programs to both males and females under a diversity or remedial rationale.[8]

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[7] The Citadel has a male-only admissions policy that is the subject of two pending actions. *Johnson* v. *Jones*, Civ. No. 2:92-1674-2 (D.S.C., complaint filed June 11, 1992); *Faulkner* v. *Jones*, C.A. No. 2:93-0488-2 (D.S.C., complaint filed Mar. 2, 1993).

[8] Petitioners note (Pet. 10) that this Court has twice before addressed claims involving single-sex education, and in each case the lower court's decision permitting single-sex education was affirmed without an opinion. See *Vorcheimer* v. *School Dist.*, 532 F.2d 880 (3d Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977); *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971). Those decisions do not support the Commonwealth's practice of offering a distinctive education program only to one gender under a policy of gender diversity. In *Vorcheimer*, a girl sought admission to an all-male public high school. The school system, however, also had an all-female public high school (as well as coeducational high schools) that offered similar courses of equal quality. 532 F.2d at 881-882. Thus, the plaintiff "d[id] not allege a deprivation of an education equal to that which the school board makes available to boys." *Id.* at 886. In *Williams*, men sought admission to a state-supported college for women. The State's system of higher education, however, also offered a school for women, and the court found that there were no special features that made the women's college better than the men's college. 316 F. Supp. at 136-138. It should also be noted that *Williams* was decided when gender classifications were analyzed under a rational basis test. Because *Vorcheimer* and *Williams* did not involve the issue presented here, the decisions in those cases does not impugn the decision below, and the grant of certiorari in *Vorchheimer* and the summary affirmance in *Williams* do not support further review in this case.



Finally, the decision below plainly has only limited bearing on the validity of single-sex prisons and similar facilities. Compare *Pitts* v. *Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (addressing claim of gender discrimination in prisons).

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In sum, the court of appeals properly applied the *Hogan* test and correctly concluded that the Commonwealth of Virginia failed to justify offering a VMI-type education to men but not to women.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General*

JAMES P. TURNER
*Acting Assistant Attorney General*

JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
*Attorneys*

APRIL 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 80250